EMPLOYMENT TRIBUNALS

Claimant: Mr A Wilson

Respondent: Tesco Stores Limited

Heard at: Manchester (by CVP) **On:** 10-12 November 2020
16 December 2020
(in Chambers)

Before: Employment Judge Ainscough
Mr M Smith (CVP)
Mr I Taylor (CVP)

REPRESENTATION:

Claimant: Mr M Keenan, Solicitor
Respondent: Ms J Ferrario, Counsel

JUDGMENT

1. The unanimous decision of the Tribunal is that the claims of disability discrimination contrary to section 15 and section 26 of the Equality Act 2010 are successful.

2. The unanimous decision of the Tribunal is that the claim of failure to make reasonable adjustments contrary to section 21 of the Equality Act 2010 is unsuccessful.

REASONS

Introduction

1. The claimant works as a Warehouse Coordinator for the respondent, a supermarket chain at its distribution centre in Widnes, and has done since 6 June 2010. The claimant's role is to coordinate warehouse operatives to pick products from the Chill 1 and Chill 2 areas for distribution to the respondent's stores.

2. The claimant commenced early conciliation on 31 July 2019 and received the ACAS early conciliation certificate on 31 August 2019. The claimant presented a claim for disability discrimination on 9 December 2019. On 10 January 2020 the

respondent submitted a response. On 24 January 2020 the claimant provided further and better particulars of his claim. On 2 March 2020 the claimant provided further particulars of claim. On 19 March 2020 the respondent submitted an amended response.

3. The respondent conceded that the claimant suffers from a disability of pulmonary fibrosis, in accordance with section 6 of the Equality Act 2010.

4. A case management hearing took place before Employment Judge Buzzard on 28 January 2020. At that hearing, the claimant agreed that he no longer pursued his claim of direct disability discrimination contrary to section 13 of the Equality Act 2010. However, at the outset of this hearing, the joint List of Issues agreed between the parties included a direct discrimination claim. After some discussion, it was agreed that the claimant no longer pursued this claim, and that issue was removed from the agreed List of Issues.

5. Prior to the start of the evidence, in response to a query from the Tribunal, the claimant's representative confirmed that the "something arising" requirement of the section 15 claim was "limitations placed upon the claimant because of his medical condition".

6. It was confirmed that the claim for reasonable adjustments was ongoing, as noted in the Case Management Order at paragraph 19. However, the claimant conceded that his job no longer required him to lift moderately heavy objects and the provision, criterion or practice for the purpose of the section 21 claim was "a requirement that as a warehouse coordinator the claimant was to push or pull containers or stillages and other units".

7. In addition, the claimant conceded that the complaint of harassment following receiving the written outcome of his grievance appeal on 6 December 2019 was no longer pursued and therefore issue 12(viii) was removed from the List of Issues. The parties agreed that as a result it was no longer necessary for Louise Stamper to give evidence or for the Tribunal to consider her witness statement.

8. Finally, the respondent clarified that the time point being pursued was that, if the claimant was unable to prove that he was subject to one continuing act of discrimination, his Employment Tribunal claim form had been lodged out of time. It was conceded by the respondent that if the Tribunal decided that the last act about which the claimant complained occurred after the early conciliation process had been started, it could be included within the claim before the Tribunal.

Issues

9. Subject to the above concessions, the parties agreed a joint List of Issues for the Tribunal to determine as follows:

Discrimination arising from disability: section 15 Equality Act 2010

(1) Was the claimant subject to the following treatment:

(i) On 13 May 2019 John Pennie told the claimant that if he did not sign a shop floor contract that his employment would be terminated by reason of capability?

(ii) On 20 May 2019 during a welfare meeting, John Pennie told the claimant that if he did not sign a shop floor contract that his employment would be terminated by reason of capability?

(2) Did this constitute unfavourable treatment?

(3) If so, was this because of "something arising" from the claimant's disability, namely that of the limitations placed upon him because of his medical condition?

(4) If so, was this unfavourable treatment a proportionate means of pursuing a legitimate aim?

Reasonable Adjustments: sections 20 and 21 Equality Act 2010

(5) Did the respondent have the following provision, criterion or practice in place: a requirement that as warehouse coordinator the claimant was to push or pull containers or stillages and other units?

(6) If so, did any such PCP put the claimant at a substantial disadvantage in comparison with persons who do not have a disability?

(7) If so, did the respondent know or could the respondent have reasonably been expected to have known that the claimant was likely to be placed at such a disadvantage?

(8) If so, did the respondent take any steps to avoid any such disadvantage? The adjustment requested by the claimant was for arrangements to be made on a permanent basis in relation to the lifting and restocking: did the respondent make any such arrangements?

Harassment: section 26 Equality Act 2010

(9) Did the respondent subject the claimant to unwanted conduct related to his disability, in particular:

(i) On 24 January 2019, Ian Brougham said to the claimant while standing in a queue at the canteen, "why am I hearing your name all the time?";

(ii) On or about 30 January 2019, after the claimant and Phil Taylor had been discussing Paul Pogba, and the claimant had demonstrated his "run-up" technique", Phil Taylor sent an email to John Pennie saying that the claimant needed to "watch himself";

(iii) On or about 16 April 2019, John Pennie told the claimant that James Wainwright had a video of him dancing in a nightclub and had questioned the extent of the claimant's disability;

(iv) On or about 13 May 2019, John Pennie told the claimant that if he did not sign a shop floor contract that his employment would be terminated by reason of capability;

(v) On 20 May 2019, during a welfare meeting, the claimant was told that if he did not sign a shop floor contract his employment would be terminated on grounds of capability;

(vi) Immediately prior to the claimant's return to work on 2 September 2019, the claimant was informed that he could not return to his coordinator's role as the respondent was of the view that he could not undertake the duties due to his disability;

(vii) Upon his return to work on 2 September 2019, the claimant expected to be assigned to an appropriate role and instead was left without a role and spent most of the day either in an interview room or in a public area at the respondent's site.

(10) If so, did the alleged conduct have the effect of humiliating the claimant?

(11) If so, was it reasonable for the claimant to feel humiliated?

(12) If so, was the conduct related to the claimant's disability?

(13) Did the claimant make a formal complaint about the alleged conduct, and if so what steps did the respondent take in response?

<u>Burden of Proof</u>

(14) Has the claimant established facts from which the court could decide in the absence of any other explanation that unlawful discrimination had taken place?

(15) If so, has the claimant satisfied the statutory test set out in section 136 of the Equality Act 2010 and **Madarassy v Nomura International PLC [2007] ICR 867**?

<u>Time Limits</u>

(16) The claimant presented the claim to the Tribunal on 9 December 2019 having taken early conciliation between 31 July and 31 August 2019. Are the events in this claim that predate 8 August 2019 out of time?

(17) If so, should the Tribunal exercise its discretion to consider as part of the claim those events that fall outside the time limit?

<u>Remedy</u>

(18) If the claim is found in the claimant's favour, what compensation is claimed by the claimant for loss, injury to feelings and interest?

Evidence

10. The parties agreed a joint hearing bundle that ran to 625 pages. The hearing took place by way of Cloud Video Platform ("CVP").

11. The Tribunal spent the morning of day one reading the witness statements, and the claimant gave evidence for the remainder of day one and the morning of day two.

12. John Pennie, one of the claimant's managers, gave evidence for the remainder of day two and the morning of day three. Three other managers, Phil Taylor, James Wainwright and Ian Brougham, gave evidence on the morning of day three. On the afternoon of day three Gill Pritchard, who investigated the claimant's grievance, and John Carrington who dealt with the first stage appeal of the grievance procedure, gave evidence.

13. The claimant also submitted a witness statement from a Carl Leach who did not attend the hearing.

14. In light of time constraints, it was agreed that the parties would submit written submissions to the Tribunal and the Tribunal would make its decision in chambers on 19 December 2019.

Relevant Legal Principles

15. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

16. Harassment during employment is prohibited by section 40(1)(a).

<u>Discrimination arising from disability</u>

17. Section 15 of the Equality Act 2010 states that there will be discrimination arising from disability if:

> **"(a) A treats B unfavourably because of something arising in consequence of B's disability and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

<u>Reasonable adjustments</u>

18. Section 20 of the Equality Act 2010 sets out the following duty:

> **20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) ….

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Harassment

19. The definition of harassment appears in section 26 which so far as material reads as follows:

"(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are …disability".

Code of Practice on Employment 2011

20. The Code of Practice on Employment issued by the Equality and Human Rights Commission in 2011 provides a detailed explanation of the legislation. The Tribunal must take into account any part of the Code that is relevant to the issues in this case.

21. In particular the Tribunal has considered:

(a) paragraphs 4.30 - 4.32 to decide whether the respondent's actions were proportionate to achieving a legitimate aim;

(b) paragraphs 6.23 – 6.29 to decide whether the adjustments suggested are reasonable; and

(c) paragraphs 7.9 – 7.11 to decide whether acts of harassment are related to the claimant's disability.

Burden of Proof

22. The burden of proof provision appears in section 136 and provides as follows:

"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

23. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

24. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Time Limits

25. Finally, the time limit for Equality Act claims appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

26. In considering whether conduct extended over a period we had regard to the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**.

<u>Early Conciliation</u>

27. Section 18A of the Employment Tribunals Act 1996 provides:

> **"Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter."**

28. Section 140B of the Equality Act 2010 provides that the period of early conciliation will not be counted when working out the time limit set in section 123 of the Equality Act 2010. In addition, if that time limit would expire, if it had not been extended by the period of conciliation, during the period of when conciliation started and ending one month after the prospective claimant receives the conciliation certificate, the time limit will expire one month after the receipt of the conciliation certificate.

29. In the case of **Compass Group UK and Ireland Ltd v Morgan 2017 ICR 73 EAT,** the Employment Appeals Tribunal determined that a conciliation certificate is not limited to acts which pre-date the start of early conciliation. The wording of section 18A refers to a "matter" as opposed to a particular claim. The EAT determined that a matter can include events that occur on different dates. Subsequent case law has established that the events in question should be related to be capable of coverage by the early conciliation certificate.

Findings of Fact

30. The respondent operates a distribution centre, seven days a week 24 hours per day, to distribute goods to its superstores. The majority of the workforce work shifts. The largest area is known as "chill 1" where stock is distributed from a refrigerated area. Prior to his diagnosis the claimant predominantly worked in this area as a warehouse coordinator five days a week. There is also a "chill 2" area where ambient stock is distributed and the temperature is approximately 12° Celsius.

31. In August 2017 the claimant was diagnosed with pulmonary fibrosis. From August 2017 until November 2017 the claimant was absent from the respondent's workplace as a result of his disability.

32. On the claimant's return to work it was agreed that he would perform his warehouse coordinator role for three days a week in the "chill 2" area as it was considerably warmer than the "chill 1" area.

33. After a period of time the claimant was asked to work in the back office assisting with customer service.

34. In October 2018 the claimant was successful in applying for a temporary role as a Customer Liaison for Eddie Stobart within the respondent's transport office. The claimant remained employed by the respondent but was seconded to this role.

35. On 24 December 2018, the claimant commenced a period of absence as a result of his disability and returned to work on 4 January 2019.

36. On 24 January 2019 the claimant had a welfare meeting with a manager, John Pennie. During that meeting the claimant and John Pennie discussed his role and reasonable adjustments.

37. On 30 January 2019 the claimant was absent as a result of sickness. On the same date the Warehouse Service Team Manager, Phil Taylor, sent an email to various managers confirming the claimant's absence and offering an opinion that the claimant did not appear to be in any discomfort, and that there was evidence of the claimant running on the spot, suggesting his back was not that bad.

38. On 15 February 2019 the claimant attended an absence review meeting following his sickness absence, which had ended on 8 February 2019. During that meeting the claimant complained to his manager, Gary Jackson, that the depot manager, Ian Brougham had questioned the claimant as to why Ian Brougham kept hearing the claimant's name, and the claimant said this intimidated him.

39. On 14 March 2019 the claimant sent Gary Jackson an email retracting the Ian Brougham complaint, explaining that it had been said in the heat of the moment and he did not mean it.

40. On or around 22 March 2019 the claimant was told that his secondment had come to an end and he could not revert to the warehouse coordinator role but instead would become a warehouse operative.

41. On 13 May 2019 an email was sent from the People and Safety Manager, Hilary Jackson, to John Pennie querying whether the claimant had signed the warehouse operative contract or whether he was still showing as a coordinator. Ian Brougham forwarded this email to John Pennie and asked whether he could put it to bed once and for all.

42. On the same day the claimant and John Pennie had a conversation about the claimant's ability to perform his warehouse coordinator role.

43. On 20 May 2019 the claimant had a welfare meeting with John Pennie at which they discussed the claimant's ability to perform the warehouse coordinator

role. John Pennie informed the claimant that it would be best to go on a warehouse operative contract or be on capability. The claimant responded that he had no choice as he was under duress to accept the warehouse operative contract or be finished on capability.

44. On 21 May 2019 the claimant submitted a grievance in which he complained that his coordinator supplement had been removed, that there had been a failure to follow the absence policy process, he had been made to feel that his job was under threat and that managers had subjected him to distressing comments. The respondent acknowledged receipt on the same day and confirmed somebody would be in touch.

45. On 3 June 2019 the claimant reported sick. Despite this, on 7 June 2019 the claimant attended a grievance investigation meeting with Gill Pritchard, a People Partner.

46. On 11 July 2019 Gill Pritchard conducted a grievance investigation meeting with John Pennie and Ian Brougham. On 12 July 2019 Gill Pritchard conducted a second meeting with John Pennie and investigation meetings with Ged Rooney, the claimant's line manager and Phil Taylor. On 16 July 2019 Gill Pritchard conducted investigation meetings with Hilary Jackson, Elaine Evans, a People Adviser and James Wainwright the Warehouse Service Team Manager.

47. On 18 July 2019 the claimant received a copy of Gill Pritchard's investigation report. Gill Pritchard upheld the complaints of removal of supplement, failure to follow the absence policy and made to feel the claimant's job was under threat. However, Gill Pritchard did not find that the claimant's managers had subjected him to distressing comments.

48. On 19 July 2019 Gill Pritchard held grievance outcome meetings with John Pennie, Hilary Jackson, Phil Taylor and James Wainwright. On the same date, a witness identified by the claimant, Carl Leach, responded to Gill Pritchard's email confirming he overheard the conversation between the claimant and John Pennie on 13 May 2019.

49. On 23 July 1019 the claimant emailed the HR Department to say he was very happy with the outcome of his grievance as it had been proven that he was not at fault.

50. However, on 26 July 2019, the claimant appealed the parts of his grievance that were not upheld.

51. On 12 August 2019 the claimant returned to work from sickness absence and had a return to work meeting with a manager, Martin Gamble during which it was agreed he would work as a coordinator in "chill 2". On 13 August 2019 the claimant attended an absence review meeting with another manager, John Kenyon. This meeting was adjourned as the claimant's trade union representative was not available. On 14 August 2019 the claimant commenced annual leave for two weeks.

52. On 2 September 2019 the claimant returned to work.

53. On 19 September 2019 the adjourned absence review meeting reconvened with the claimant's line manager, Martin Gamble. On the same date, the claimant attended the grievance appeal hearing with Jonathan Carrington.

54. On 3 October 2019 the claimant was informed by Jonathan Carrington that his appeal had been rejected and the finding of Gill Pritchard had been upheld.

55. On 16 October 2019 the claimant attended a meeting with Jonathan Carrington to discuss that conclusion. The claimant appealed Jonathan Carrington's conclusion and met with the second stage appeal handler, Louise Stamper, on 12 November 2019.

56. On 6 December 2019 Louise Stamper upheld the findings of Gill Pritchard and Jonathan Carrington.

Submissions

Respondent's Submissions

57. The respondent denies that John Pennie threatened the claimant during their discussion on 13 May 2019. Instead, the respondent says this was the claimant's interpretation of that conversation. The Tribunal was asked to ignore the statement of Carl Leach as Mr Leach had not attended at the Tribunal to give evidence.

58. The respondent submits that the meeting notes of 20 May 2019 are not verbatim and that this was conceded by the claimant. The respondent denies that the claimant was threatened with the termination of his job, and again suggests that this was an interpretation by the claimant. The respondent submits that the claimant accepted during cross examination that the first stage grievance did not find that he had been subject to a threat in either of these meetings. The respondent submits that John Pennie was supportive and the claimant knew that he had the claimant's best interests at heart. It is also submitted that the claimant's trade union representative did not object to the meeting on 20 May 2019. The respondent submits that the claimant was not subject to unfavourable treatment.

59. In the alternative, the respondent submits that if the Tribunal does find such unfavourable treatment it was justified because the respondent needed people that could carry out all physical aspects of coordinator role.

60. The respondent denies that it applied a provision, criterion or practice for the claimant to push or pull containers or stillages and other units as part of his coordinator role. It is the respondent's case that the claimant is not required to do this because there are colleagues in place to assist him. In the alternative the respondent submits that if there was such a provision, criterion or practice in place there are other colleagues in place to assist the claimant.

61. The respondent denies that the comment made by Ian Brougham intimidated the claimant, particularly in light of the claimant's retraction. The respondent submits that the Phil Taylor did not send the email and the claimant, despite referring to having sight of the email, was unable to produce a copy before the Tribunal.

62. The respondent submits that James Wainwright and John Pennie denied having seen a video of the claimant dancing and the claimant was unable to provide any evidence to corroborate his allegation.

63. The respondent submits that the claimant is unable to prove any conversation that took place immediately prior to his return to work on 2 September 2019. Instead, the respondent submits that the claimant conceded in evidence that that conversation in fact took place on 20 May 2019.

64. The respondent contends that the claimant has not proven that on his return to work on 2 September 2019 he was left without an appropriate role and left sitting around on the respondent's site. The respondent contends that the claimant returned to his role that he had been performing prior to his sickness absence and the only delay was the resolution of the attendance review meeting on 19 September 2019.

65. The respondent submits that given the dates of early conciliation, the last act of discrimination must be taken as 31 July 2019, which would require the claimant to put his claim to the Tribunal by 30 November 2019, and as a result of only submitting it on 9 December 2019, it is out of time. The respondent submits there was no reason to wait to submit his claim, the claimant had the benefit of trade union representation throughout and he should not have waited for the grievance to resolve before submitting a claim.

Claimant's Submissions

66. The claimant submits that he has been treated as an inconvenience by his managers, who resented the need to accommodate him and his disability.

67. The claimant submits that Ian Brougham conceded he made the comment and as such the claimant was entitled to feel intimidated. It is submitted that the email sent by Phil Taylor on 30 January 2019 is evidence that Phil Taylor was questioning the extent of the claimant's condition and on the balance of probabilities this would have created an intimidating and hostile environment for the claimant.

68. The claimant submits that the James Wainwright incident was more likely than not to have occurred in light of the attitude displayed by his managers who doubted the true extent of his condition.

69. It is submitted that the claimant's recollection of the incidents on 13 and 20 May 2019 should be preferred to that of John Pennie. The claimant does rely upon the statement of Carl Leach and that John Pennie was under pressure from Ian Brougham to finalise the claimant's contract issue. The claimant submits that he was under duress to accept an operative contract, and this is evidenced by the notes of the meeting. It is also submitted that on the claimant's return to work on 2 September 2019 he returned to an uncertain role and was left without work to do.

70. The claimant concedes that adjustments have been made to his role but he feels vulnerable because they are not permanent.

71. The claimant submits that he has been subject to a course of conduct over time and that the Tribunal should exercise any discretion that is required to ensure that the claim is in time.

Discussion and Conclusions

<u>24 January 2019</u>

72. Ian Brougham admits he spoke to the claimant about hearing the claimant's name, in the public area of the canteen, but denies that the claimant was upset.

73. After that conversation, the claimant met with John Pennie to discuss reasonable adjustments and said he was thankful that the managers had given him support.

74. The conversation between Ian Brougham and the claimant was prior to the meeting with John Pennie. During that meeting the claimant did not complain about Ian Brougham, and was complimentary about the management.

75. Whilst the Tribunal acknowledges that the issue was raised at the meeting on 15 February 2019, the claimant subsequently retracted that complaint. The Tribunal heard no evidence from the claimant, either in chief or during cross examination, why he did not raise the issue with John Pennie on the day, and only subsequently raised it with Gary Jackson. When asked why the claimant had retracted the complaint, he said because he had been advised to do so.

76. The Tribunal finds that the claimant was not humiliated by this conversation.

<u>30 January 2019</u>

77. The Tribunal was taken to an email sent by Phil Taylor to a range of managers on 30 January 2019 at page 236 of the bundle, but this email is not as described by the claimant.

78. No specific detail was given by the claimant about this email in his original claim form. The specific detail was set out by the claimant in his further particulars of claim on 24 January 2020.

79. It was the claimant's evidence that he had discovered this email on receipt of documents generated by a subject access request. The email at page 236 was disclosed during the disclosure process for these proceedings and does not corollate with the allegation brought by the claimant. The Tribunal was not provided with a copy of the email seen by the claimant following the subject access request.

80. The claimant refers to an incident in the grievance submitted on 21 May 2019. However, importantly, in the grievance, the claimant describes the incident as Phil Taylor making a comment as opposed to sending an email.

81. The Tribunal finds there is no evidence that Phil Taylor did send an email as described by the claimant.

<u>16 April 2019</u>

82. The claimant complains that James Wainwright told John Pennie that he had a video of the claimant dancing in a nightclub, and questioned the extent of the claimant's disability. In the claimant's grievance of 21 May 2019 the allegation is that James had seen a video that was on the claimant's phone and had made a

comment to the claimant that there was nothing up with him. The specific allegation was not within the claimant's ET1 but again came later in the claimant's further and better particulars.

83. In evidence the claimant said he had shown his video to Ged Rooney and James Wainwright had been present. James Wainwright denies that he ever saw a video or spoke to John Pennie. John Pennie says that this never happened and that he did not see a video or speak to James Wainwright.

84. The Tribunal determines on the balance of probabilities given the inconsistency with the claimant's grievance, his evidence and the further and better particulars, that this incident did not occur.

<u>13 May 2019</u>

85. The claimant alleges that on this date the claimant and John Pennie had a conversation in which John Pennie said that if the claimant did not sign the warehouse operative contract his employment would be terminated by reason of capability. It is the claimant's case that this amounts to both harassment and discrimination arising from disability.

86. On this date, Ian Brougham forwarded Hilary Jackson's email to John Pennie asking, effectively, whether John Pennie was going to sort out the claimant's contract issue. In evidence, John Pennie admitted that there was a conversation between himself and the claimant about what the claimant could and could not do. The allegation is recorded by the claimant in his grievance of 21 May 2019. Whilst John Pennie admitted in evidence that they did speak about capability, he denied it was a threat. John Pennie also admitted in evidence that capability was one of the grounds for dismissal, a fact of which the claimant admitted he was also aware.

87. The Tribunal finds that the conversation did take place. The claimant described in evidence how this conversation left him upset and scared that he would lose his job, and under cross examination he admitted he felt vulnerable. The record in the claimant's grievance document was approximately one week after the conversation took place and the Tribunal finds this to be accurate. The Tribunal accepts that the claimant would feel vulnerable by such a conversation.

88. The fact that there was a discussion around the claimant's capability was interpreted by the claimant as a threat and he was humiliated by this conversation, which took place in an open plan office. The Tribunal has read the statement of Carl Leach and does attribute some weight to it given that it accords with the evidence of both that of the claimant and John Pennie.

89. The Tribunal finds that the claimant would not have challenged John Pennie during the conversation if he had not been upset by what had been said. It was reasonable for the claimant to feel the way that he did due to the discussion about capability and his knowledge that this was known as a fair reason for dismissal. The conduct was unwanted and it related to the claimant's disability because it was about the limitations his disability placed on his substantive role. The claimant raised his complaint about this meeting in his grievance and there was a finding that he was made to feel that his job had been threatened. This conversation was harassment contrary to section 26 of the Equality Act 2010.

90. This conversation also amounted to unfavourable treatment for the purposes of the discrimination arising from disability claim contrary to section 15 of the Equality Act 2010. The reason for the conversation was because of the limitations that were placed upon the claimant in performing his substantive role as warehouse coordinator. There is evidence in the bundle that pressure was placed on John Pennie by HR to either increase the claimant's hours and duties or get him to sign the warehouse operative role. References are made to not being able to pay the claimant for a role he was unable to perform.

91. In submissions the respondent contended that it needed a person in the coordinator's role that could do all the physical aspects of the role. In the amended grounds of resistance, the respondent submitted that any such unfavourable treatment was a proportionate means of achieving the legitimate aim of proper management of colleague capability and ensuring support and assistance to colleagues with long-term medical conditions.

92. The claimant was working in the "chill 2" area with assistance and his role was being performed in the "chill 1" area by another individual. During his evidence Ian Brougham said that the cost of the claimant remaining in the warehouse coordinator role was approximately £6 a week. It is fair to say that Ian Brougham trivialised the cost on the basis that it cost the respondent approximately £1million per week to run the distribution centre, and he had brought the running costs in under budget that year. Ian Brougham was not concerned about the claimant remaining within the warehouse coordinator role, even if it was supernumerary.

93. It is clear the claimant was supernumerary but was not a financial burden on the respondent. In addition, as another was fulfilling his role in the "chill 1" area, it is unlikely that the respondent was short-staffed. Therefore, the Tribunal finds that it was not proportionate to discuss the possibility of capability to achieve either legitimate aim. The Tribunal therefore finds that this conversation was also discrimination arising from disability.

20 May 2019

94. The claimant alleges that during the meeting with John Pennie on 20 May 2019 he was again told that if he did not sign the operative contract he would be placed on capability. The Tribunal has considered the transcript of the meeting of 20 May 2019 at page 288 of the bundle. Specific reference is made to John Pennie saying that "best would be going on warehouse colleague contract, or be capability". In response it is recorded that the claimant says, "under duress, I feel I have no choice but to go on a warehouse operative contract or to be finished on capability".

95. Whilst the respondent says that the trade union representative did not object to this comment, no reassurance was given to the claimant by John Pennie that he was wrong to view this as duress or that he would be finished on capability.

96. In evidence John Pennie says the comment was not meant as a threat, but it is clear from the claimant's evidence that he viewed the reference to capability as termination and without any reassurance, the Tribunal can understand why. The reason for the comment was because of the limitations imposed on the claimant by his disability.

97. The claimant produced his grievance the very next day and his complaint about that meeting was as presented to the Tribunal. The fact that the trade union representative did not take issue with the meeting does not mean that the claimant did not feel humiliated by this comment. The claimant was humiliated and it was reasonable for him to feel that way, and this was related to his disability.

98. The claimant also alleges that this comment amounted to discrimination arising from disability. The Tribunal agrees that the comment was unfavourable. There was no discussion between the claimant and John Pennie about reasonable adjustments in his substantive role of warehouse coordinator. The only options that were offered to the claimant was a demotion to a warehouse operative contract or capability.

99. Similarly, the Tribunal finds that this comment was made because of the limitations placed on the claimant by his disability and the pressure placed on John Pennie by HR and senior managers to resolve the matter as a result of a perceived cost to the respondent. The claimant was resistant to coming out of his substantive post, and the Tribunal finds that the issue of capability was raised to warn the claimant about the possibility of termination of employment.

100. The Tribunal does not find that this was a proportionate means of pursuing either legitimate aim. Ian Brougham was clear in his evidence that the cost of the claimant remaining in his warehouse coordinator role in a supernumerary post was trivial. The main part of the claimant's substantive role was being covered by another and the business could afford to accommodate the claimant in this way. This comment also amounted to discrimination arising from disability.

Immediately before 2 September 2019

101. The claimant alleges that immediately prior to his return to work from annual leave he was informed he would not be returning to his substantive warehouse coordinator role. This allegation postdates the grievance and therefore is not dealt with in the grievance paperwork.

102. The claimant had a return to work meeting on 12 August 2019 at which it is recorded, on the first page of that meeting, that he would be returning to the "chill 2" area. The Tribunal only has the first page of the four page document but it sets out that was the claimant's destination. The absence review meeting on 13 August 2019 was abandoned because there was no trade union representative available.

103. During cross examination the claimant admitted that the last time he was told he would not be doing the warehouse coordinator role was during the meeting with John Pennie on 20 May 2019. Therefore, the Tribunal concludes that he was not told immediately prior to his return to work that he would not be performing his substantive warehouse coordinator role.

Return to work on 2 September 2019

104. It is alleged that on the claimant's return to work on 2 September 2019 he was not assigned to an appropriate role and he spent most of the day sitting around at the respondent's site.

105. The Tribunal has seen that on 12 August 2019 the claimant was told by Martin Gamble that he would be returning to work as a warehouse coordinator in the "chill 2" area. However, it is the claimant's evidence that when he eventually returned to work on 2 September 2019 there was no role for him.

106. At the absence review meeting on 19 September 2019 with Martin Gamble the claimant complained that there had not been a return to work plan in place and he specifically said during his grievance that he did not want to be stood around not knowing what he was doing. The claimant gave evidence that this was exactly what happened. The claimant said he was sat in a room for 2½ hours with his manager and union representative without anybody knowing what job he was doing. Martin Gamble acknowledged during the absence review meeting that this situation was frustrating – he did not dispute the incident.

107. It is submitted by the respondent that Martin Gamble was in fact off sick when the claimant returned to work, and the Tribunal finds that this fact makes it more likely than not that the claimant was sat around in the absence of his line manager to direct where the claimant was to work.

108. The Tribunal therefore accepts that the claimant felt humiliated and it was reasonable to feel that way and that he was in that position because of the limitations posed by his disability.

Reasonable Adjustments Claim

109. The claimant and John Pennie agreed at the welfare meeting on 20 May 2019, that the warehouse coordinator role involved pushing and pulling containers or stillages and other units. The claimant described his role as coordinating the pulling of products on cages so that they can be packed for distribution. The claimant stated that once the cages have been pulled, it is necessary to put the cages back so that the lanes are kept free. The claimant was clear that a warehouse coordinator would be expected to deal with the pushing and pulling of units.

110. Currently, the claimant does not have to perform such tasks if he is not capable, because the respondent has placed individuals in the claimant's area to assist. However, the Tribunal finds that substantively the role requires the performance of such tasks and the provision, criterion or practice is applied by the respondent.

111. The claimant is at a substantial disadvantage because he is unable to perform these tasks without assistance and, as has been found by the Tribunal, unless the claimant agrees to sign an operative contract, he has been threatened with capability.

112. The fact that the respondent has put adjustments in place is evidence that it knew the claimant was disabled and that he would be unable to perform his role without assistance.

113. The reality is that the respondent has made adjustments but only on a temporary basis. It is the claimant's case that these adjustments should be made on a permanent basis within this particular role.

114. The question for the Tribunal is would it be a reasonable for the respondent to make the adjustments to the claimant's role on a permanent basis.

115. The Tribunal does not agree that it would be reasonable to make these adjustments on a permanent basis. Ian Brougham gave evidence that he was able to accommodate the claimant in a supernumerary role because he was operating the site within the allocated budget. However, this may not always be the case and the making of permanent adjustments for the claimant in this role could eventually cost the respondent more than a nominal amount. There may be a requirement to move the claimant to another role, as was done on his return from sickness absence in 2018, which can accommodate the adjustments required.

116. The respondent operates a passport policy in which an employee can move around the business provided any restrictions can be accommodated. It is right to say that the claimant will be permanently restricted but the nature of the adjustments required will vary depending on the role he is asked to perform.

Time Point

117. As a result of the Tribunal's findings, the last act of discrimination occurred on 2 September 2019 when the claimant returned to work. Section 123(3) of the Equality Act 2010 provides that conduct extending over a period is to be treated as done at the end of that period. The claimant was subject to discriminatory conduct from 13 May 2019 to 2 September 2019 and therefore, the time limit for bringing his claims expired on 1 December 2019.

118. The Employment Appeals Tribunal has determined that if a claimant is subject to a further act of discrimination after the conclusion of early conciliation, it is not necessary to start early conciliation again to include the new act of discrimination within the claim. This is because the parties have conciliated about a "matter" of which the new act is part.

119. The claimant did not lodge his claim until 9 December 2019 after the outcome of the grievance was known. The claim is 8 days out of time.

120. In accordance with section 123 of the Equality Act 2010, the Tribunal has a discretion to extend time in such circumstances if it considers it just and equitable to do so. The Tribunal is aware that the claimant had a trade union representative and that he instructed lawyers in approximately June or July 2019.

121. The claimant went back to work on 2 September 2019 but was left without proper management. The claimant's health remained a concern and he was undergoing x-rays to further investigate his disability. The claimant attended an attendance review management meeting and a grievance meeting on 19 September 2019, and went through two appeals about his grievance before the outcome on 6 December 2019.

122. The claimant gave evidence that he wanted to resolve the appeal process before he dealt with the issue of any Employment Tribunal claim. The Tribunal notes that the claimant initially maintained that the outcome of his grievance on 6 December 2019 was also an act of discrimination. This complaint was withdrawn at the outset of this hearing, but this explains why he and his representatives were of the view that his claim had been brought within the necessary time limits.

123. The claimant was reliant on the advice of his trade union and legal representatives. The Tribunal does not believe the claimant should be penalised for not being advised to lodge his claim earlier to ensure it complied with the necessary time limits. It is understandable why the claimant would want to resolve the matter through the grievance, given that the claimant continues to work for the respondent.

124. The Tribunal has considered whether the respondent has been prejudiced by the delay. The Tribunal did not find that any of the witnesses struggled to give evidence because of a lack of memory, and the respondent was always aware of the majority of issues the claimant was raising as a result of his grievance which he lodged on 21 May 2019.

125. The Tribunal finds it would be just and equitable to extend time in accordance with section 123 of the Equality Act 2010.

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Employment Judge Ainscough
Date 15 February 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
16 February 2021

FOR THE TRIBUNAL OFFICE

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